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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

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WENDELL GILBERT COOPER, ET AL., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Petitioner, Wendell Gilbert Cooper, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered October 8, 1970, affirming his conviction under 18 U.S.C.A. 1010 and 18 U.S.C.A. 371, and that on hearing the judgment of conviction be reversed.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, page 36) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1970. Timely Motion for Rehearing was filed, and was denied on December 8, 1970. This Court has jurisdiction under the provisions of 28 U.S.C.A., Section 1254(1).

## QUESTIONS PRESENTED

I. Whether photographs of property located at 403 Forest Avenue, Newport, Kentucky, taken June 13, 1968, should have been admitted into evidence to portray the condition of that property as of January 26, 1968, without proof that the condition of said property had not changed between the two dates.

II. Whether a prior written statement of an important government witness contradicting his testimony at trial should have been excluded as evidence to impeach that testimony.

III. Whether the Defendant's Motion for a change of venue, or a change of the location of the trial within the Eastern District of Kentucky, should have been granted by the District Court because of the massive pre-trial publicity given this case in the vicinity of Covington, Kentucky.

## STATUTORY PROVISIONS INVOLVED

### (1) 18 United States Code, Section 1010, Federal Housing Administration Transactions.

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance or credit, or mortgage insured by such Administration, or the acceptance, release or substitution of any security on such a loan, advance of credit,

or for the purpose of influencing in any way the action of such Administration, makes, utters, passes, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged or counterfeited, or willfully over-values any security, asset or income, shall be fined not more than $5,000.00, or imprisoned not more than two years, or both. June 25, 1948, C. 645, 62 Stat. 731."

**(2) 18 United States Code, Section 371, Conspiracy to Commit Offense or to Defraud United States.**

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, C. 645, 62 Stat. 701."

## STATEMENT OF THE CASE

Wendell G. Cooper was charged with a violation of Title 18, Section 1010, United States Code, in Counts I and III of Indictment Number 9955 returned on October 28, 1968, in the United States District Court, Eastern District of Kentucky (Appendix, page 21).

Defendant Cooper entered a plea of not guilty to each of the counts of the indictment.

Defendant, by counsel, on January 6, 1969, moved the District Court to either change the venue of this action or to fix the place of trial at Lexington, Kentucky, rather than Covington (Appendix, page 31). In support of this motion there was presented the affidavit of John W. Core, counsel for defendant (Appendix, page 33), and also some 40 pages of copies of newspaper articles regarding this action which had appeared in the Kentucky Post, a newspaper published in the Covington, Kentucky, area between May 29, 1968, and October 31, 1968. The basis for this motion was that the newspaper articles had so inflamed and prejudiced its readers concerning this case that the defendant could not receive a fair trial in the Covington, Kentucky, area. This motion was overruled on January 19, 1969 (Appendix, page 34).

The motion for a change of venue or a change in the place of trial was renewed during the voir dire examination of the jurors before trial. It was brought to the attention of the Court that approximately one-half of the prospective jurors were Kentucky Post readers at the time that these newspaper articles were

appearing. This motion was again overruled by the District Court.

During the course of the trial, numerous witnesses were produced by the government to substantiate the charges in the indictment. One of these witnesses was Charles H. Card, who at the time which the indictment concerns, was the Chief Appraiser for the Federal Housing Administration in Kentucky. He testified that he appraised the five properties which were the subject matter of the overt acts charged to defendant Cooper in the indictment at values which are substantially less than the appraised value which defendant Cooper placed upon them. He further stated that the house at 403 Forest Avenue was "not by any stretch of the imagination in excellent condition," a condition which defendant Cooper was charged with misrepresenting in Count III in the indictment in this case.

Defendant attempted to introduce a memorandum from Mr. Card to Mr. Raymond G. Fleming, Director of the Federal Housing Administration in Kentucky, dated April 17, 1968, which motion was overruled by the Court and the memorandum was entered in evidence as an avowal, Defendant's Exhibit No. 8 (Appendix, page 34). This memorandum indicated that Card was forwarding all appraisals made since January 1, 1968, including the five in question in this case, to Mr. Fleming and that he was satisfied with what the figures showed. The refusal to admit this memorandum into evidence was assigned as substantial error by defendant in that it removed the possibility that

defendant could evaluate the veracity and memory of the witness for the jury through this memorandum.

Another portion of the government evidence presented in this case was a number of photographs of the property located at 403 Forest Avenue, Newport, Kentucky, taken by John M. Barry, an agent of the Federal Bureau of Investigation, on June 13, 1968. These photographs were used to prove that defendant Cooper had misrepresented the condition of the premises at said location on January 26, 1968, as was charged in Count III of the indictment. Despite defense objections, these photographs were admitted into evidence even though there was no proof to show that the property in question had not changed in condition between January 26, 1968, the date alleged in Count III of the indictment, and June 13, 1968, the date the pictures were taken. The admission of these pictures was also assigned as substantial error by defendant.

At the conclusion of the prosecution's case, defendant's motion for a judgment of acquittal on both counts was overruled. Defendant Cooper testified in his own behalf and stated that he had no knowledge and no part in any conspiracy or agreement to in any way misrepresent values or conditions to the Federal Housing Administration. At the conclusion of the evidence, the jury returned a verdict against defendant Cooper, finding him guilty as to both Count I and Count III of the indictment. The District Court entered a sentence of one year and one day on each count to be served concurrently in the federal penitentiary.

The judgment of the District Court was appealed by the Defendant to the Sixth Circuit Court of Appeals and affirmed by that Court on October 8, 1970 (Appendix, page 36). Defendant's timely motion for a rehearing was overruled on December 8, 1970 (Appendix, page 37).

## STATEMENT OF REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Petitioner contends that the decision of the Sixth Circuit Court of Appeals in sanctioning the District Court's admission into evidence of photographs taken *almost five months* after the date of the specification in the indictment without establishing there was no substantial change in the subject matter photographed conflicts with judgments rendered by other Courts of Appeals, particularly the Third Circuit Court of Appeals in Griffin v. Ensign, 234 F. 2d 307 (1956).

In the Griffin case, *supra*, it was the decision of the Third Circuit Court of Appeals that photographs taken just one day after an event in question were inadmissible into evidence without proof that the object photographed had not changed. The Court further stated their conclusion regarding the photographs as follows:

> "The appellants argue that certain photographs of the Burnett truck taken at a garage by their witness Crist on the day following the accident were excluded improperly. *The record contains no testimony or offer of testimony that the condition of the truck was substantially the same*

> ***as it was immediately following the accident.*** **In fact, the only testimony as to these photographs was by Crist, *who did not see the truck until the morning on which he took the photographs. The trial judge's ruling in excluding the photographs was correct.*" (All italics ours.)**

**In the instant case, no evidence whatsoever was introduced by the prosecution to show whether the condition of the property at 403 Forest Avenue, Newport, Kentucky, had changed between January 26, 1968, the date of the alleged criminal activity, and June 13, 1968, the date the photographs were taken. The jury was faced with the question in the trial of this action of determining whether the pictured furnace and water heater were "new" and whether the exterior of the house had been "newly painted." There can be no question that the furnace, water heater and exterior painting were not as "new" in June as they were in January, and there was no evidence to prove that there had not been vandalism or other unusual deterioration of these items between the dates in question.**

**The law has long been settled that photographs may be admitted into evidence so long as they correctly represent and depict the subject matter photographed; however, it *must be* established that photographs taken at a time *later* than the transaction in question correctly portray the subject as it was at the time that is the subject matter of the indictment. This rule is stated in Jones On Evidence, Volume 3, Section 630, page 1196 as follows:**

> "But the fact that the photographs were taken at a time remote to the transaction in question does not render them inadmissible *if witnesses are able to testify that they are correct representations of the conditions existing at the time in question.*"

This maxim is also stated in American Jurisprudence 2d, Volume 29, Evidence, Section 789, page 685:

> "The mere fact, however, that photographs were taken at a time different from that in question does not render them inadmissible *if witnesses are able to verify them as substantial representations of the conditions as they existed at the time in question.*" (Italics ours.)

Petitioner maintains that his conviction undoubtedly was based in large measure on the District Court's erroneous admission into evidence of the pictures in question. The Sixth Circuit Court of Appeals in affirming the decision of the District Court has rendered a judgment in conflict with the standard enunciated by the Third Circuit Court of Appeals in Griffin v. Ensign, *supra*, for the admission of photographs taken after the event in question. This conflict between the decisions of the Sixth Circuit Court of Appeals and the Third Circuit Court of Appeals should be resolved by this Court.

II. Petitioner contends that the District Court's refusal to admit into evidence the prior inconsistent statement of Charles Card, an important government witness at the trial of this action, was prejudicial error; and that the affirmation of this ruling by the

Sixth Circuit Court of Appeals conflicts with decisions of other Circuit Courts and also with decisions of this Court.

This memorandum was prepared by Mr. Card, the Chief Appraiser for the F.H.A. in Kentucky, for Raymond G. Fleming, Director of the Federal Housing Administration in Kentucky and is appended (pages 34-35). Mr. Card indicated that as of the time he prepared the memorandum, he was satisfied with the appraisals that were made by the defendant. The memorandum contains the statement, "If this does not satisfy the inquiry, I suggest that addresses be secured from our accuser." This statement strongly implies that Mr. Card had reviewed these appraisals (which included those that were the subject matter of the indictment), was willing to reveal them for public scrutiny and was confident that any "accuser" would be satisfied with what these records revealed. This statement, of course, was made shortly after the appraisals in question in this action, and before mounting newspaper publicity and indictments placed further pressure on the employees of the Federal Housing Administration. Had this memorandum been admitted into evidence, it would have been open to petitioner to ask Mr. Card at trial why he saw *no impropriety as of April 17, 1968*, but *later testified on October 22, 1969*, that these appraisals were *grossly improper*, all to the *extreme prejudice of the rights of the petitioner*.

Numerous decisions of this Court and various Courts of Appeals have held that prior inconsistent statements are admissible to impeach the credibility of

a witness. For example, the case of Grunewald v. United States, 353 U. S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957) held:

> "It is, of course, an *elementary rule of evidence* that *prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness.* 3 Wigmore, Evidence, Section 1040."

Further, the Eighth Circuit Court of Appeals in Patterson v. United States, 361 F. 2d 632 (1966), in considering the admissibility of prior inconsistent letters written by a prosecution witness said:

> "Mrs. Driggin's admission of authorship of the letters was inconsistent with her prior testimony. Defendant was seeking to have the letters received in evidence for the purpose of showing statements in the letters inconsistent with Mrs. Driggin's direct testimony. Her admission made the letters available for such purpose."

Wigmore on Evidence, Volume 3, Section 1040, page 724, has also considered the question of what sort of contradictory statements should be admitted in allowing the jury to evaluate the credibility and memory of a witness:

> "As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said. On a comparison of the two utterances, are they in fact inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?"

Other significant decisions have considered the question of whether statements in the hands of prosecution witnesses must be produced for inspection and use by the defense in a criminal case. The most important case in this area is Jencks v. United States, 353 U. S. 675, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957) which outlined not only the criteria for the production of documents for defense use, but also criteria for the determination of whether prior contradictory statements by a witness could be used to impeach that witness' testimony at trial:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witnesses recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at trial or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

This case was followed directly by the holding in Thomas Clancy v. United States, 365 U. S. 312, 5 L. Ed. 2d 574, 81 S. Ct. 645 (1961). Both cases buttress the proposition *that even if Charles Card's memorandum to Mr. Raymond Fleming of April 17, 1968, did not completely contradict all of what he said at trial, it should have been admitted for purposes of cross-examination so that the credibility and memory of the*

*witness could have been fully tested*, and to clearly reflect that his attitude respecting the appraisals had changed diametrically between the date of the memo and the date of the trial, all to the strong prejudice of the petitioner.

This Court should grant this Petition for a Writ of Certiorari so that it might resolve the conflict between this decision and decisions of other Courts of Appeals and of this Court regarding the admissibility of prior inconsistent statements for purposes of impeachment.

III. The District Court's overruling of the pre-trial motions by defendant for a change of venue or a change in the location of the trial and the affirmation of the District Court's rulings by the Sixth Circuit Court of Appeals present this Court with a judgment not only in conflict with decisions of other Courts of Appeals, but this ruling by the Sixth Circuit Court of Appeals is such a departure from the usual course of judicial proceedings that it calls for this Court to exercise its power of supervision over the Sixth Circuit Court of Appeals.

The newspaper publicity complained of was propagated by the Kentucky Post, a newspaper operating in and around the vicinity of Covington, Kentucky. The newspaper undertook a "Ten Day Investigation" which they claimed brought all of the information which was ultimately contained in this indictment to light. The newspaper contained a series of articles over a substantial period of time, usually on its front page, contending that they had unearthed the facts and that the government authorities should follow up

on these facts to obtain convictions. For example, the newspaper stated editorially, "Let's take the lid off F.H.A. and the Department of Housing and Urban Development and find out who the *rascals* are."

Further publicizing the role of the newspaper in this investigation, the newspaper printed a statement by Senator John Williams, United States Senate, complimenting a Kentucky Post writer for "exposing this *racket*." Further, in the same article, the Kentucky Post mentioned other transactions, such as the property at 1121 Park Avenue, which were not included in the indictment returned by the grand jury in this case and could not have been introduced as evidence in this case.

The Kentucky Post, in summing up what it considered to be its effect on the indictment and action in question, on October 30, 1968, stated as follows:

> "An expose of the racket was published in the Kentucky Post beginning late in May. This directly started an investigation by the FBI and resulted in the grand jury indictments. Almost everything in the lengthy federal indictment was published in the Kentucky Post as the newspaper investigation unfolded."

It is submitted that the continuing investigation, publicizing it in a most prominent fashion and championing of this cause by the Kentucky Post had a great influence on its readers and greatly prejudiced the possibility that the defendant, Wendell G. Cooper, could receive a fair trial in this area.

In selecting a jury in this action, counsel for the defendant exercised numerous preemptory challenges to remove individuals who stated they knew something of the facts involved in this action as a result of the newspaper publicity. Even though these precautionary steps were taken to defend the rights of the defendant, the jury finally empaneled contained several members who admitted that they were familiar with the case through the wide publicity given it, and it was apparent that a panel composed of jurors who had not read of the brazen accusation could not be found.

The pervasive effect of pre-trial publicity has frequently been discussed in recent federal criminal decisions. One critical aspect of the examination of prospective jurors is a question of whether a juror, once he has admitted that he has been exposed to and remembers the publicity given a particular case, can be expected to give a completely candid and truthful answer to the inquiry as to whether this publicity would affect his decision as to the guilt or innocence of the defendant at trial. In Delaney v. United States, 199 F. 2d 107 (1952, First Circuit Court of Appeals), a case was considered in which congressional hearings were held concerning the alleged improper acts of a Collector of Internal Revenue for the District of Massachusetts. These hearings received great publicity by the local press, but the District Court refused to grant a continuance. In finding that this refusal was an abuse of discretion, the First Circuit held:

> "No doubt the District Judge conscientiously did all he could, in questions he addressed to the

> jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that the defendant's guilt or innocence would be determined solely upon the basis of evidence produced at the trial. But as stated by Justice Jackson concurring in Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949): The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

The only method available to counsel and the Court to attempt to remove the possibility of the effects of prejudicial pre-trial publicity was by questions and instructions. Defendant contends that, as the Delaney case points out, this is not enough to insure that the defendant's rights will be protected. See also United States v. Denno, 313 F. 2d 364 (1963, Second Circuit Court of Appeals), cert. denied 372 U. S. 978, 10 L. Ed. 2d 143, 83 S. Ct. 1112.

Another case which involved great pre-trial publicity was considered by this Court in a habeas corpus proceeding styled Irvin v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961). In this case, a series of murders in a community was given great publicity by local media and several of the jurors thought the defendant was guilty but stated during voir dire examination that they could disregard this opinion in rendering a fair trial. This Court in granting a petition stated:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair trial violates even the minimal standards of due process. Re Oliver 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499; Tumey v. Ohio, 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437."

In the Dowd decision, this Court also stated that, "Findings of impartiality should be set aside only where prejudice is manifest." The massive pre-trial publicity given the instant case may well have created the "manifest" prejudice which this Court speaks of. The fact that petitioner presented some forty pages of copies of newspaper stories regarding the case certainly should have been enough to cause the District Court to grant either a change of venue or a change of the place of trial.

A more recent decision by the Ninth Circuit Court of Appeals concerning this problem is that of Silverthorne v. United States, 400 F. 2d 627 (1968). This case also dealt with great pre-trial publicity surrounding a defendant charged with misapplication of bank funds and the making of false entries in bank records. The District Court did practically all the voir dire examination, and the Court of Appeals ruled that it had not sufficiently ascertained whether the pre-trial publicity would prejudicially affect the opinions of jurors. The Court discussed the problem of giving a defendant a fair trial in the face of great publicity in detail:

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. Sheppard v. Maxwell, 384 U. S. 333, 362, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600 (1966).

"Therefore, when pre-trial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered. Aldridge v. United States, 283 U. S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931). He must determine whether 'the nature and strength of the opinion formed (if any) are such as in law necessarily * * * raise the presumption of partiality,' Reynolds v. United States, 98 U. S. 145, 156, 25 L. Ed. 244 (1878)."

Petitioner respectfully submits that there has certainly been at least a "*probability of unfairness*" in the instant case as a result of the great familiarity with the facts of the case by many jurors before the trial began. This publicity, however, was localized so that its effects could have been eradicated by either a change of venue or even a change of the place of trial within the Eastern District of Kentucky. Without either change, however, defendant was denied a fair trial by an impartial jury.

This Court should grant this petition to review the decision herein because it conflicts with decisions of

other Courts of Appeals, departs from the usual course of judicial proceedings, denies the petitioner a fair and impartial trial and jeopardizes his liberty, freedom and citizenship.

Respectfully submitted,

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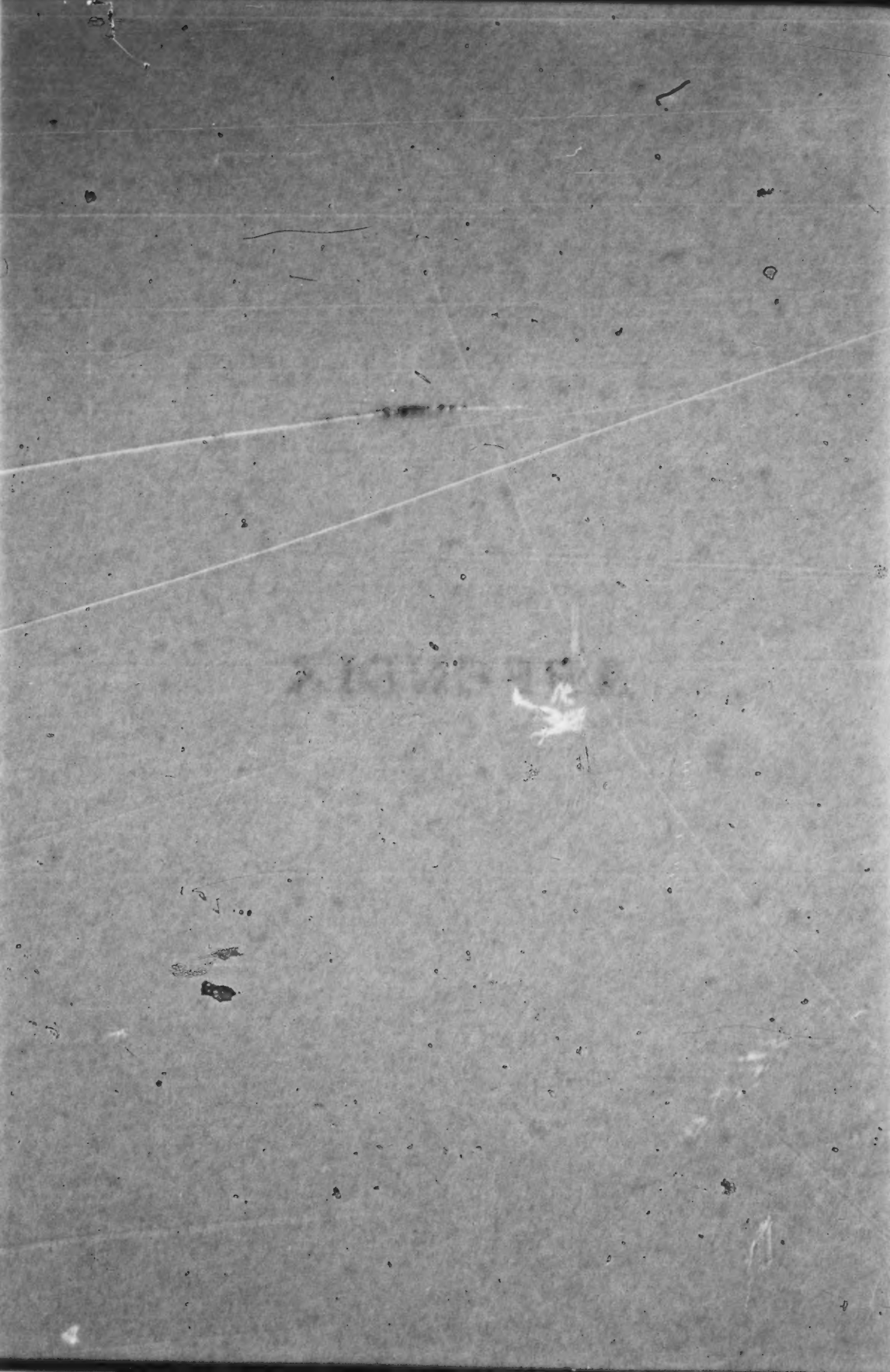

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
OCTOBER SESSION 1968
LEXINGTON

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|---|---|
| United States of America<br>vs.<br>Leon Steinberg, and<br>Ardmore Realty Company, a corporation<br>Wendell Gilbert Cooper, a/k/a W. G. Cooper | No. 9955—10-28-68<br>Transf. to Cov.<br>#10,689 |

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## INDICTMENT

### COUNT 1

(Title 18, Sec. 371, USC)

The Grand Jury Charges:

1. That at all times hereinafter mentioned the Federal Housing Administration was an agency of the U. S. Department of Housing and Urban Development and operated as such within the Eastern District of Kentucky.

2. That at all times hereinafter mentioned Ardmore Realty Company was an Ohio Corporation with office in the City of Cincinnati in said state and engaged in the business of buying and selling real estate in said city and in Campbell County in the Eastern District of Kentucky.

3. That at all times hereinafter mentioned Leon Steinberg was president of Ardmore Realty Company, Inc., its principal stockholder and exercised dominion and control over its affairs and operations.

4. That at all times hereinafter mentioned Wendell Gilbert Cooper a/k/a W. G. Cooper, was employed by the

Federal Housing Administration as a real estate appraiser, was assigned to and did work as such in Campbell County and other counties within the Eastern District of Kentucky.

5. That at all times hereinafter mentioned The Kissell Company, a corporation, with its principal office in the City of Springfield, in the state of Ohio, and a branch office in the City of Cincinnati in said state, was engaged in the business of a mortgage broker.

6. That at all times hereinafter mentioned Robert Wren was employed by the Kissell Company at its Cincinnati Branch Office in the capacity of a loan officer.

7. That at all times hereinafter mentioned the Ardmore Realty Company did finance the sale of real property by means of loans insured by the Federal Housing Administration.

8. That at all times hereinafter mentioned it was a part of the established procedure of the Federal Housing Administration prior to insuring a loan made in connection with the purchase of a specific item of real property to have such property appraised by an appraiser in its employ.

9. Commencing on or before the 26th day of January, 1968 and continuing to on or about the 20th day of June, 1968 in the Eastern District of Kentucky, and at other places to the Grand Jury unknown

Leon Steinberg
Ardmore Realty Company, a corporation, and
Wendell Gilbert Cooper a/k/a W. G. Cooper

did unlawfully, willfully, knowingly, and fraudulently combine, conspire, confederate and agree among themselves, and with the Kissell Company, Inc., and Robert Wren, named as co-conspirators but not defendants herein, and with other persons to the Grand Jury unknown, to violate Section 1010, Title 18, United States Code; that is to say, having knowledge that Ardmore Realty Company in connection with its business of buying and selling real estate in the Eastern District of Kentucky, and elsewhere, would

seek Federal Housing Administration insurance on loans made by lending institution to persons purchasing real property from said Ardmore Realty Company, and having further knowledge that any such purchaser in order to qualify for such loan insurance would be required to furnish to Federal Housing Administration information reflecting the financial status of such person including but not limited to the amount of cash on hand, bank deposits, real and personal property owned, debts owed, place of employment and approximate annual income, and monthly rental expenses, and having further knowledge that in the processing of any application for FHA loan insurance it would be required that any property intended to be offered as security for such insurance would have to be appraised by an appraiser in the employ of Federal Housing Administration, said defendants and co-conspirators did combine, conspire, confederate and agree to (a) unlawfully influence, hamper, hinder, burden, obstruct and impede the lawful functions, operations and purposes of the Federal Housing Administration by making, and causing to be made, false and fraudulent appraisal of real estate offered for sale by Ardmore Realty Company wherein such properties would be appraised and valued in amounts grossly in excess of their fair market value, and it would be falsely and fraudulently stated and represented that such properties were in good condition when in truth and in fact they were not in good condition, (b) unlawfully file and cause to be filed with the Federal Housing Administration for the purpose of influencing its actions, false credit information, false, forged and fraudulent statements and representation with respect to the financial status, employment and earnings of applicants for FHA loan insurance, (c) to thereby secure FHA loan insurance for applicants not qualified therefor, (d) use the aforesaid false and fraudulent FHA appraisals as a device to induce prospective purchasers to purchase real estate from Ardmore Realty Company at such inflated

appraised price and thereby received and obtain an excessive profit, all to the personal use, gain and benefit of the said defendants and co-conspirators.

10. It was a part of said conspiracy that Ardmore Realty Company and Leon Steinberg would contract with persons having residential property for sale in Campbell and other counties in the Eastern District of Kentucky to purchase said property at a specified price, contingent upon FHA making an appraisal of such property in an amount much in excess of such purchase price, and also in excess of the fair market value of same.

11. It was a part of said conspiracy that defendant, W. G. Cooper acting in his capacity as appraiser for FHA would and did appraise such property in an amount grossly in excess of the fair market value of said property.

12. It was a part of said conspiracy that Ardmore Realty Company using the false, inflated and over-valued appraisals of the said W. G. Cooper would by trick, scheme and device induce and persuade people to purchase said properties at such appraised prices.

13. It was a part of said conspiracy that Ardmore Realty Company and Leon Steinberg would file and cause to be filed with Federal Housing Administration false, forged, and fraudulent statements and representations with respect to the financial statute of persons seeking to qualify for Federal Housing Administration loan insurance.

14. It was a part of said conspiracy that Ardmore Realty Company and Leon Steinberg would permit only W. G. Cooper on behalf of FHA to appraise property said company proposed to sell in such manner.

## OVERT ACTS

In furtherance of the aforesaid conspiracy and during its continuance and in order to effect the objects thereof, the defendants and co-conspirators did commit among others, the following overt acts.

1. Prior to January 26, 1968 Ardmore Realty Company entered into a contingent contract with the owners of residential property at 403 Forest Avenue, Newport, Kentucky to purchase same for the sum of $8,600.00.

2. On or about January 26, 1968 W. G. Cooper appraised the property mentioned in overt Act No. 1, at $13,800.00.

3. Prior to February 23, 1968 Ardmore Realty Company, Inc. entered into a contract with the owners of property located at 2 Summer Hill Drive, Newport, Kentucky to purchase same at the price of $10,400.00.

4. On or about February 23, 1968, W. G. Cooper, acting within the scope of his employment as a FHA appraiser, appraised the property mentioned in overt act No. 3 at $15,900.00.

5. On or about February 27, 1968, Ardmore Realty Company, Inc. entered into a contract with the owners of property at 1051 Grand Avenue, Newport, Kentucky to purchase same for the sum of $10,100.00.

6. On or about March 8, 1968 W. G. Cooper, acting within the scope of his employment as a FHA appraiser, appraised the property mentioned in overt act No. 5 at $15,900.00.

7. On or about March 16, 1968 Ardmore Realty Company, Inc. entered into a contract with the owners of property at 14 Chesapeake, Newport, Kentucky to purchase same for the sum of $9,000.00.

8. On or about March 29, 1968, W. G. Cooper, acting in the capacity of a FHA appraiser, appraised the property mentioned in overt act No. 7 at $15,900.00.

9. On or about March 8, 1968, W. G. Cooper acting in the capacity of a FHA appraiser appraised the property at 523 Columbia Street, Newport, Kentucky at $13,850.00.

10. On or about the 29th of April, 1968 Ardmore Realty Company, Inc. purchased the property mentioned in overt act No. 9 for $8,600.00.

11. On or about February 14, 1968, Ardmore Realty Company, Inc. as seller entered into a contract with Henry Reece and Ruby Reece, husband and wife, as purchasers whereby the seller agreed to sell and the purchasers agreed to purchase the property at 403 Forest Street, Newport, Kentucky for $13,800.00.

12. On or about March 19, 1968, Ardmore Realty Company, Inc. as seller entered into a contract with Nancy Lee Kaufman, as purchaser whereby the seller agreed to sell the property at 2 Summer Hill Drive, Newport, Kentucky for $15,400.00.

13. On or about April 2, 1968, Ardmore Realty Company, Inc. as seller entered into a contract with Thurman Miller and Frankie Miller, husband and wife, as purchaser whereby the seller agreed to sell and the purchaser agreed to purchase the property at 1051 Grand Avenue, Newport, Kentucky for $15,900.00.

14. In March 1968 Leon Steinberg failed and refused to permit Mr. Robert M. Daniel, an appraiser in the employ of FHA to make an appraisal of property at 14 Chesapeake Avenue, Newport, Kentucky.

15. On or about March 26, 1968, Ardmore Realty Company, Inc. as seller entered into a contract with Carlos F. Farnosh, Jr. and Sally Farnosh, husband and wife, as purchasers whereby the seller agreed to sell and the purchasers agreed to purchase the property at 14 Chesapeake Avenue, Newport, Kentucky for $15,500.00.

16. At various times to the Grand Jury unknown Leon Steinberg paid sums of money to W. G. Cooper.

## COUNT 2

(Title 18, Sec. 1010 USC)

The Grand Jury Further Charges:

That on or about the 14th day of February 1968 in the Eastern District of Kentucky

Ardmore Realty Company, Inc., and
Leon Steinberg

for the purpose of obtaining a loan from the Kissell Company, a mortgage broker, Cincinnati, Ohio for the purchase of residential property at 403 Forest Avenue, Newport, Kentucky, by Henry Reece and Ruby Reece, with the intent that such loan would be offered to and accepted by the Federal Housing Administration, an agency of United States Department of Housing and Urban Development for insurance, did willfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to the Kissell Company, a certain false statement in a document, that is a Contract to Purchase between Ardmore Realty Company, as seller, and Henry Reece and Ruby Reece as purchasers, wherein Ardmore Realty Company and Leon Steinberg, acting by Margie Seleifer, did certify as follows:

"RECEIPT

Newport, Kentucky, February 14, 1968

We hereby acknowledge receipt of Four Hundred Fifty n/oo Dollars ($450.00) in connection with the offer and on the terms therein provided.

Ardmore Realty Company
By /s/ Margie Seleifer"

Ardmore Realty Company and Leon Steinberg well knowing at the time said statement was made, passed, uttered and published, the said statement was false in that no down payment had been made by said Henry Reece and Ruby Reece.

COUNT 3

(Title 18, Sec. 1010, USC)

The Grand Jury Further Charges:

That on or about the 26th day of January, 1968, in the Eastern District of Kentucky,

Wendell Gilbert Cooper, and
Leon Steinberg,

for the purpose of influencing the action of the Department of Housing and Urban Development did willfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to the Department of Housing and Urban Development, a certain false statement in a document, that is, Form No. 2800-3, "F.H.A. Underwriting Report" over the signature of W. G. Cooper, F.H.A. Appraiser, wherein the said W. G. Cooper and Leon Steinberg certify in part with respect to the condition of residential property at 403 Forest Avenue, Newport, Kentucky, as follows:

> "Subject has new furnace, water-heater—newly painted on exterior"—

Said W. G. Cooper and Leon Steinberg then well knowing said statement was false in that the furnace and water-heater in said property were not new, and the exterior of said building was not newly painted.

COUNT 4

(Title 18, Sec. 1010, USC)

The Grand Jury Further Charges:

That on or about the 11th day of April, 1968, in the Eastern District of Kentucky

> Ardmore Realty Company, and
> Leon Steinberg

for the purpose of influencing the action of the Department of Housing and Urban Renewal Development, did wilfully and knowingly make, pass, utter and publish to the Department of Housing and Urban Development, a certain false statement in a document, that is "Statement of Seller," over the signature of Ardmore Realty Company by Leon Steinberg with reference to property at 2 Summer Hill Drive,

Newport, Kentucky (F.H.A. Case No. 201-048826-203) and stated:

> "The seller hereby acknowledges the receipt of payment in cash in full from the buyer in the amount stated in the contract for the purchase of the property and declaring that the owners of said property are in no way indebted to the seller and to his best knowledge and belief said owners do not have outstanding any unpaid obligations contracted in connection with the purchase or construction of said property other than the insured mortgage, and further, that there has not been nor will there be any refund of any portion of the equity payment."

Said Ardmore Realty Company and Leon Steinberg then well knowing said statement was false in that no cash payment had been made by the buyer of said property.

A True Bill

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Foreman

George I. Cline
United States Attorney

# UNITED STATES DISTRICT COURT

**EASTERN DISTRICT OF KENTUCKY**
**COVINGTON**

**No. 10,669**

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United States of America, - - - - - Plaintiff,

v.

Leon Steinberg, and
Ardmore Realty Company, a Corporation,
Wendell Gilbert Cooper, a/k/a W. G. Cooper, - Defendants.

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## ORDER.

This case is assigned for hearing on all pending motions at Lexington on Monday, January 6, 1969, at 1:00 P.M.

December 19, 1968.

Mac Swinford, Judge

A True Copy: Attest
Davis T. McGarvey, Clerk,
U. S. District Court,
By Nancy C. Anderson,
Deputy Clerk.

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

No. 9955

United States of America, - - - - Plaintiff,

v.

Leon Steinberg, and
Ardmore Realty Company, a Corporation,
Wendell Gilbert Cooper, a/k/a W. G. Cooper, - Defendants.

## MOTION FOR TRANSFER OR IN ALTERNATIVE TO FIX PLACE OF TRIAL AT LEXINGTON.

Defendant, Wendell Gilbert Cooper, moves, pursuant to Rule 21 (a) of the Federal Rules of Criminal Procedure, for an order transferring this cause to the United States District Court for the Western District of Kentucky, Louisville, Kentucky, Division, on the ground that there exists within this District such great prejudice that he cannot here obtain a fair and impartial trial.

In the event this Court concludes that defendant, Wendell Gilbert Cooper, has not made the requisite showing that he cannot obtain a fair and impartial trial anywhere within this District then, and in the alternative, he moves pursuant to Rule 18 of the Federal Rules of Criminal Procedure, for an order setting the place for the trial of this cause at the City of Lexington, in the Eastern District.

In support of this motion, defendant submits the Affidavit of John W. Core, attorney for the defendant, Wendell Gilbert Cooper.

The enormous amount of adverse and prejudicial publicity is shown by the affidavit of John W. Core, and that represents only a part of the continuing newspaper, television and radio publicity prevalent in this area.

The exhibits annexed to the attached affidavit are not intended as a complete list of the unfavorable publicity and do not fully depict the full measure of the biased publicity. If this showing does not satisfy the Court defendant requests an opportunity to present additional exhibits to more fully inform the Court as to the situation now existing and the additional publicity which might be expected prior to the beginning of the trial of this cause and its completion.

DATED: December 12, 1968.

(s) John W. Core,
511 Citizens Union Bank Building,
Lexington, Kentucky 40507,
Attorney for Defendant, Wendell Gilber Cooper.

I certify that a true copy of the foregoing Motion and Affidavit have been personally delivered to the United States Attorney, Hon. George I. Cline, Federal Building, Lexington, Kentucky, this 12th day of December, 1968.

(s) John W. Core,

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Attorney for Defendant,
Wendell Gilbert Cooper.

**AFFIDAVIT IN SUPPORT OF MOTION FOR TRANSFER OR IN ALTERNATIVE TO FIX PLACE OF TRIAL AT LEXINGTON.**

John W. Core, being duly sworn, states:

I am the attorney for the defendant, Wendell Gilbert Cooper, herein.

I have caused to be collected clippings from newspapers circulated in this Judicial District for the period beginning May 29, 1968, through October 31, 1968, relating to the arrest of the defendant and his alleged criminal schemes.

The annexed exhibits hereto are not presented as a complete collection of all newspaper, television and radio coverage within this Judicial District relating to the defendant through October 31, 1968. Specifically, the publicity complained of consists of what may be reasonably be described as a crusade on the part of the Kentucky Post, that segment of the Cincinnati Post and Times Star distributed in the Northern portion of Kentucky, and is for the most part limited to articles prepared by Kentucky Post Staff Writer, Carl West.

Attached news items accompanying this affidavit consists of forty (40) pages. It is recognized there is some overlapping and possibly some omission as a result of the copying. The affiant has in his possession all of the items from which these copies were made and they may be referred to as need be.

(s) John W. Core,
Affiant.

Subscribed and sworn to before me by John W. Core this 12th day of December, 1968.

My Commission expires: August 2, 1970.

(s) Rose E. Bouder,
Notary Public, at Large, Kentucky.
(SEAL)

**ORDER.**

On January 6, 1969, at Lexington, came Assistant United States Attorney, Pat Molloy and the defendant, Wendell Gilbert Cooper by his attorney John W. Core.

The Court heard Mr. Core in support of the defendant's Motion to transfer this case to the Western District of Kentucky or in the alternative to fix the place of trial at Lexington, and the statement of Mr. Molloy on the motion.

The Court being advised, ORDERED AND ADJUDGED that the Motion be and it is overruled.

January 8, 1969.

Mac Swinford, Judge.

Copies to:
U. S. Attorney,
John W. Core.

A True Copy: Attest
Davis T. McGarvey, Clerk,
U. S. District Court,
By Illegible.

**DEFENDANT'S EXHIBIT 8.**

April 17, 1968

Mr. Raymond G. Fleming, Director,
FHA, Louisville, Kentucky,
Charles Card, Chief Appraiser,

**Congressional Inquiry—Newport, Kentucky**

Our temporary employee, Dwight Jackson, pulled all the cases from the general files appraised in Boone, Kenton and Campbell Counties since January 1, 1968.

The attached list shows, in the First Column—the case number; Second Column—Sales price as reported by mortgagee; Third Column—Valuation placed by FHA; Fourth Column—Those that have a firm application; Fifth Col-

umn—Those that have contracts submitted with the application; Sixth Column—Shows the dollar amount appraised over the list price. (This sometimes reflects repairs made by the appraisers that were not proposed by the mortgagees.) The last column shows—The dollar amount appraised under the list price.

These 99 cases do not represent all the cases appraised in Northern Kentucky this year, because some cases with repair requirements are in the Lexington office for inspection.

If this does not satisfy the inquiry I suggest that addresses be secured from our accuser.

Charles Card,
Chief Appraiser

Attachment
CD:ls

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

**No. 20,285**

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United States of America, - - Plaintiff-Appellee,

v.

Wendell Gilbert Cooper, - - Defendant-Appellant.

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**ORDER**—Filed October 8, 1970.

Before: Phillips, Chief Judge, Weick and Edwards, Circuit Judges.

On consideration of the briefs, records and oral argument in the above-style appeal, and finding no error contained in this record concerning the admission or exclusion of evidence which prejudiced the rights of appellant; and

Further, noting that the record (particularly including the voir dire examination of prospective jurors and the fact that the jury was chosen without exhaustion of challenges) discloses no reversible error in the District Judge's overruling of a motion for change of venue,

The judgment of the District Court is affirmed.

Entered by order of the Court
(s) Carl W. Reuss, Clerk

**ORDER**—Filed October 8, 1970.

Before: Phillips, Chief Judge, Weick and Edwards, Circuit Judges.

On consideration of the motion for rehearing in the above-styled case, the same is hereby denied.

Entered by order of the Court
(s) Carl W. Reuss, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1223

WENDELL GILBERT COOPER, ET AL., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of knowingly making false real estate appraisals and statements to the Federal Housing Administration (18 U.S.C. 1010) and conspiracy (18 U.S.C. 371). He was sentenced to concurrent prison terms of one year and a day. The court of appeals affirmed by order (Pet. App. 36) and thereafter denied a motion for rehearing on December 8, 1970. The petition for a writ of certiorari, filed on January 9, 1971, is out of time under Rule 22(2) of this Court's Rules. The issues raised, concerning evidentiary



415-044—71

rulings and denial of motions for change of venue, do not, in any event, warrant review by this Court.

1. Petitioner was employed as a real estate appraiser for the Federal Housing Administration (I Tr. 128–129, III Tr. 542–543).[1] His primary duty was to evaluate homes in Northern Kentucky that were to be sold to prospective buyers needing FHA-insured loans (III Tr. 542–544). Petitioner, Ardmore Realty Co., and its president, Steinberg, were charged[2] with making and conspiring to make false statements and appraisals for the purpose of influencing action by the FHA (Pet. App. 21–29). Transactions involving five separate parcels of real-estate were charged as overt acts in furtherance of the conspiracy.

The proof at trial showed that at various times between January and April 1968, Ardmore Realty purchased the five parcels. Petitioner appraised the properties at amounts ranging from $5,200 to $6,900 above the selling prices and then submitted the appraisals to the FHA. Ardmore meanwhile advertised the properties and found interested buyers who, in turn, obtained loans from the mortgage broker (Kissell) contingent upon FHA approval (See II Tr. 340–352, 374, III Tr. 496–500, 518, 521–523, 529–530). The mortgage broker submitted a statement of the buyer's credit standing prepared by the real estate company (II Tr. 340–352) and the FHA eventually committed

[1] "Tr." refers to the four-volume transcript of the trial proceedings, a copy of which we are lodging with the Clerk.

[2] A mortgage broker, Kissell Company, and Robert Wren of that company were named as co-conspirators, but not indicted. Prior to trial, Steinberg and Ardmore Realty pleaded guilty.

itself to insuring the loans for the inflated value (I Tr. 154–155, 165–166, 173, 188, 192–193, 216–217, 230).

In order to show petitioner had over-valued the properties, the government called their original owners, who testified to the amount they received, a total of about $45,000, when the real estate company purchased the parcels (III Tr. 489–491, 506–508, 513–514, 526–527, 534–535). Petitioner's appraisals, which were made soon after the sales and totalled about $75,000, also were introduced (I Tr. 140, 143, 160–164, 183–186, 208–210, 226–228). The government further introduced testimony of two other FHA appraisers who estimated the fair market value of the properties. Robert Daniels gave estimates as to three parcels (III Tr. 407–415), while Charles Card estimated the value of all five (III Tr. 438–444).

Petitioner sought to impeach Card on cross-examination with a purported prior inconsistent statement contained in a letter Card had written (III Tr. 456). The trial court refused to permit the letter to be introduced (III Tr. 457). This ruling was correct. The letter (Pet. App. 34–35) had been written on April 17, 1968 in response to a Congressional inquiry. It explained a table compiled by another employee of the FHA, listing the sales prices, the FHA valuation, FHA commitments, and other information on most of the homes that had been appraised in Northern Kentucky since January 1, 1968. There was nothing in the letter suggesting that Card himself had made any appraisals or that he was satisfied with those made by petitioner. It is thus clear that the letter contained no impeachment material.

2. The government introduced evidence that petitioner had made a false statement in an FHA document concerning the physical appearance of one of the five properties. Petitioner had written, on January 26, 1968, that the house had a "new furnace, water heater * * * [and was] newly painted on exterior * * *" (I Tr. 211). The government introduced several photographs of the property, taken June 13, 1968, which showed its true, dilapidated appearance (IV Tr. 697–702). Petitioner contends that the pictures should not have been admitted unless the government made a showing that the condition of the property had not changed between January 26 and June 13. In the circumstances, however, it was not error to admit the photographs without such a showing.[3] There was scant likelihood that natural deterioration or vandalism in that relatively short period could account for the wide discrepancy between the report and the photographs. Moreover, the person who sold the property to the real estate company in February or March, 1968 testified that, at the time of sale, paint which had been applied to the house three years before had begun to peel off the frame; that the water heater was a year old; and that the furnace was three to four years old (III Tr. 515–516).

3. Prior to and again at trial, petitioner moved for a change of venue on the ground that pre-trial news coverage would deprive him of a fair trial. These

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[3] The case, *Griffin* v. *Ensign*, 234 F. 2d 307 (C.A. 3), which petitioners claim conflicts with the ruling below, is factually quite different. The ruling there dealt with a photograph of a truck taken the day after an accident in which it was involved.

motions were properly denied (Pet. App. 31–34; I Tr. 54–55). The publicity to which petitioner objected consisted of adverse stories and editorials between May and October, 1968 (Pet. 13–14, Pet. App. 33). The trial began in October, 1969. Twenty-two jurors were examined as to the prior publicity on *voir dire* (I Tr. 1–98). Seven recalled nothing about the case. Twelve remembered reading about it, but said they had never formed an opinion as to guilt or innocence. Of these, some recalled certain details, while others merely had seen headlines. The remaining three had read or heard about the case and stated that they had formed an opinion about petitioner's guilt or innocence; they were excused by the court.

The full year intervening between the publicity and the trial significantly diminished the ability of the jurors to recall the substance of the publicity. Moreover, no one on the jury panel had formed an opinion as to petitioner's guilt or innocence prior to trial. See *Irvin* v. *Dowd*, 366 U.S. 717. The trial judge did not, therefore, abuse his discretion in refusing to grant a change of venue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE 0—1971